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Chong Chee Piao & Ors v Koh Wah Leong (as Chairman of Pertubuhan Penganut-Penganut Ting Leong Keng Lee Hu Tong Chu, Pantai Remis, Manjong, Perak)

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(NCVC)(W)-2231–12 OF 2019
HAS ZANAH MEHAT, RAVINTHRAN AND MOHD SOFIAN JJCA
C 5 JANUARY 2023

Trusts and Trustees — Constructive trust — Occupation of land — Whether first landowner's donation of part of land for temple for community's benefit and unbroken presence of temple thereafter for next 55 years created constructive trust over the land on which the temple sat — Whether first landowner's grandchildren who inherited the land could not bring an action in trespass more than five decades later to evict the temple from the land

D

E In 1944, the grandfather of the first to the fourth appellants, CKS, bought a two-acre plot of land and donated a portion of it for the construction of a Taoist temple for the benefit of worshippers of the deity referred to as Ting Leong Keng Lee Hu Tong Chu in Pantai Remis, Manjung, Perak. The donation of the land saw others contributing monies towards making the construction of the F temple a reality by 1961. The temple proper occupied a quarter of the land but over time the areas adjacent to the temple came to be used as a hall and for other activities such as fire-walking. Initially, the temple was run by an informal committee, which included CKS, until that task was taken over by the respondent which was registered as a society in 1986. In May 1966, CKS G transferred the land to his son, CSS, who was the father of the first to the fourth appellants and husband of the fifth appellant. Following CSS's death in 1995, the appellants became the registered owners of the land. They no longer wanted the temple to be on the land and issued several notices to the temple management to quit the place. When the notices were not heeded, the H appellants sued the respondent in the High Court seeking vacant possession of the land, an injunction to prevent the respondent from trespassing on the land, a mandatory injunction for the demolition of all the temple structures and for damages. The respondent pleaded that the temple was not a trespasser and counterclaimed for a declaration that a constructive trust had arisen in respect I of the land occupied by the temple which had operated continuously since 1961 without interference from any party. Following a trial, the High Court dismissed the appellant's claim and allowed the counterclaim holding that the land 'occupied' by the temple was subject to a constructive trust. In order to demarcate the exact area of the land that was subject to the trust, the trial court

appointed a surveyor to draw up a survey plan of the temple, its outer structures and the right of way to the temple. However, nothing came of it because the plan that was drawn up by the surveyor lacked details. In the meanwhile, the appellants had filed the instant appeal against the trial court's decision. To assist the appellate court, the appellants commissioned a licensed surveyor to draw up a detailed plan ('exh CCS8') showing the actual area occupied by the temple proper, the areas that were occupied by smaller shrines and the hall and general-activities area as well as the access road to the temple from the main road. CCS8 was allowed to be admitted as evidence at the instant appeal hearing. The land on which the temple proper sat was shaded in orange in CCS8 whilst the areas for the hall and for general activities were shaded in blue.

Held, unanimously: (a) declaring that a constructive trust had arisen in favour of the respondent in respect of only that part of the land shaded in orange in exh CCS8 (ie, the land on which the temple proper sat) inclusive of the right of way; and (b) ordering the respondent to hand over to the appellants within three months vacant possession of the remaining land that was shaded in blue, ie, the hall and open space used for temple activities:

(1) Although CKS transferred the undivided land in 1966 to his son, CSS, the trial judge was right in holding that CKS's promise to the interim temple committee in 1960 to donate part of the land for the temple and his subsequent conduct in affirming that decision made him a trustee of that portion of the land upon which the temple proper was constructed. The respondent was right in contending that in the case of implied and constructive trusts, as opposed to an express trust, the element of intention to create a trust on the part of the testator was not essential. It was a trust that was imposed by the law to prevent unfairness or injustice (see paras 32 & 36).

(2) There was unchallenged evidence that for a continuous period of about 55 years, during the lifetime of CKS and that of his son, CSS, the temple operated on the land without any interference. Despite the absence of a formal trust deed or a written deed to transfer the land to the interim temple committee, CKS clearly intended to create a trust to benefit the local Chinese community who were devotees of the presiding deity of the temple. CKS's transfer of the land to his son, CSS, in 1966, did not mean that there was no intention to allow the temple to remain on the land. Even if it could be argued that CKS did not express an intention to create a trust, his promise to donate the land and his encouragement at the time for the erection of the elaborate concrete temple and his subsequent acquiescence in allowing the temple to remain on the land and accepting a place of honour in its ceremonies gave rise to a constructive trust as found by the trial judge (see para 43).

(3) The trial judge's finding that a charitable constructive trust had been created by CKS in 1960 was unassailable. CKS had clearly conducted himself in such a manner as to lead the interim temple committee and the local Chinese community at that time to believe that beneficial interest over a portion of the land would vest in the temple for their common good. The evidence showed that when CKS transferred the entire land to CSS, the latter also did not raise any objection to the presence of the temple on the land. As such, it was completely unconscionable now to permit the successors in title of the late CKS, who were also his heirs, to evict the temple on the ground that they were the registered title holders (see para 45).

(4) The trial judge's finding on the existence of a constructive trust was based on the evidence of SD1 who was the only witness present at the meeting of the interim committee that discussed the construction of the temple in 1960 and who said that CKS agreed to donate part of his land for the temple. SD1, however, never said that CKS agreed to donate the wider area around the temple which come to be used as the temple hall or for the carrying out of temple-related activities. No evidence was tendered about when the hall was constructed or when the area of land behind the hall was appropriated for temple activities. As such, these areas which covered about three-quarters of the land in question could not be something that CKS had contemplated in 1960 and, therefore, no constructive trust could arise in respect of those areas around the temple. The trust necessarily had to be restricted to only that portion of the land on which the temple proper sat together with the right of way for the public to access it (see para 52).

(5) The respondent's counterclaim was not time-barred under the Limitation Act 1953 as time to commence the action only ran from the date of the appellants' letter of demand in 2015. The appellants filed their action in 2016. The temple had operated on the land continuously without any interference or objection since 1961 even after CSS acquired the land from CKS. It was the appellants' letter of demand in 2015 that constituted the first clear and unequivocal threat to the possession of the land by the temple (see paras 56–57).

(6) The appellants' trespass action wholly failed, not only in respect of that part of the land upon which the temple proper sat (in view of the finding that a constructive trust had come into being in respect thereof) but also in respect of the wider areas around the temple which were used as a hall and general-activities area as no objection was taken to such use until the appellants issued their notice of demand (see para 62).

[Bahasa Malaysia summary

Pada tahun 1944, datuk kepada perayu pertama hingga keempat, CKS, membeli sekeping tanah seluas dua ekar dan mendermakan sebahagian daripadanya untuk pembinaan kuil Tao untuk manfaat penyembah dewa yang disebut sebagai Ting Leong Keng. Lee Hu Tong Chu di Pantai Remis, Manjung, Perak. Pendermaan tanah tersebut menyaksikan orang lain menyumbang wang ke arah merealisasikan pembinaan kuil menjelang tahun 1961. Kuil yang sepatutnya menduduki satu perempat daripada tanah tersebut tetapi lama kelamaan kawasan yang bersebelahan dengan kuil tersebut mula digunakan sebagai dewan dan untuk aktiviti lain seperti berjalan atas api. Pada mulanya, kuil tersebut dikendalikan oleh jawatankuasa tidak rasmi, termasuk CKS, sehingga tugas tersebut diambil alih oleh responden yang telah didaftarkan sebagai pertubuhan pada tahun 1986. Pada Mei 1966, CKS memindahmilik tanah tersebut kepada anaknya, CSS, yang merupakan bapa kepada perayu pertama hingga keempat dan suami kepada perayu kelima. Selepas kematian CSS pada tahun 1995, perayu menjadi pemilik berdaftar tanah tersebut. Mereka tidak lagi mahu kuil berada di atas tanah tersebut dan mengeluarkan beberapa notis kepada pengurusan kuil untuk keluar dari tempat tersebut. Apabila notis tidak diendahkan, perayu menyaman responden di Mahkamah Tinggi memohon milikan kosong tanah, injunksi untuk menghalang responden daripada menceroboh tanah, injunksi mandatori untuk merobohkan semua struktur kuil dan untuk ganti rugi. Responden memplidkan bahawa kuil tersebut bukan penceroboh dan menuntut balas untuk satu deklarasi bahawa amanah konstruktif telah timbul berhubung tanah yang diduduki oleh kuil tersebut yang telah beroperasi secara berterusan sejak 1961 tanpa gangguan daripada mana-mana pihak. Lanjutan daripada perbicaraan, Mahkamah Tinggi menolak tuntutan perayu dan membenarkan tuntutan balas dengan memutuskan bahawa tanah yang 'diduduki' oleh kuil tersbut tertakluk kepada amanah konstruktif. Bagi menyempadankan kawasan sebenar tanah yang tertakluk kepada amanah, mahkamah perbicaraan melantik juruukur untuk merangka pelan ukur kuil, struktur luarnya dan hak laluan ke kuil. Walau bagaimanapun, tiada apa yang berlaku kerana pelan yang dirangka oleh juruukur kurang terperinci. Sementara itu, perayu telah memfailkan rayuan semasa terhadap keputusan mahkamah perbicaraan. Untuk membantu mahkamah rayuan, perayu mengupah juruukur berlesen untuk merangka pelan terperinci ('eksh CCS8') yang menunjukkan kawasan sebenar yang diduduki oleh kuil, kawasan yang diduduki oleh kuil yang lebih kecil dan dewan dan aktiviti am kawasan serta jalan masuk ke kuil dari jalan utama. CCS8 dibenarkan untuk diterima sebagai keterangan pada pendengaran rayuan semasa. Tanah di mana kuil tersebut terletak betul-betul berlorek dengan warna oren dalam CCS8 manakala kawasan untuk dewan dan untuk aktiviti umum berlorek dengan warna biru.

Diputuskan, (a) mengisytiharkan bahawa amanah konstruktif telah timbul

memihak kepada responden berkenaan dengan hanya bahagian tanah yang berlorek oren di eksh CCS8 (iaitu, tanah di mana kuil tersebut terletak) termasuk hak laluan; dan (b) memerintahkan responden menyerahkan kepada perayu dalam tempoh tiga bulan milikan kosong baki tanah yang berlorek biru, iaitu dewan dan kawasan lapang yang digunakan untuk aktiviti kuil:

(1) Walaupun CKS memindahkan tanah yang belum dibahagi pada tahun 1966 kepada anaknya, CSS, hakim perbicaraan telah betul dalam memutuskan bahawa janji CKS kepada jawatankuasa sementara kuil pada tahun 1960 untuk mendermakan sebahagian daripada tanah untuk kuil dan tindakannya yang seterusnya dalam mengesahkan bahawa keputusan tersebut menjadikannya pemegang amanah bahagian tanah tersebut di mana kuil dibina. Responden adalah betul dalam berpendapat bahawa dalam kes amanah tersirat dan konstruktif, berbanding dengan amanah nyata, elemen niat untuk mewujudkan amanah di pihak pewasiat adalah tidak penting. Ia adalah amanah yang dikenakan oleh undang-undang untuk mencegah ketidakwajaran atau ketidakadilan (lihat perenggan 32 & 36).

(2) Terdapat keterangan yang tidak dicabar bahawa untuk tempoh berterusan kira-kira 55 tahun, semasa hayat CKS dan anaknya, CSS, kuil tersebut beroperasi di atas tanah tersebut tanpa sebarang gangguan. Walaupun tiada surat ikatan amanah rasmi atau surat ikatan bertulis untuk memindahkan tanah kepada jawatankuasa sementara kuil, CKS jelas berhasrat untuk mewujudkan amanah untuk memberi manfaat kepada masyarakat Cina tempatan yang menjadi penyembah dewa kuil tersebut. Pindahmilik tanah CKS kepada anaknya, CSS, pada tahun 1966, tidak bermakna tiada niat untuk membenarkan kuil tersebut kekal di atas tanah. Walaupun boleh dikatakan bahawa CKS tidak menyatakan hasrat untuk mewujudkan amanah, janjinya untuk menderma tanah dan galakan beliau pada masa tersebut untuk pembinaan kuil konkrit yang kekal dan persetujuannya seterusnya membenarkan kuil tersebut kekal di atas tanah dan menerima tempat penghormatan dalam upacaranya menimbulkan amanah konstruktif seperti dapatan oleh hakim perbicaraan (lihat perenggan 43).

(3) Dapatab hakim perbicaraan bahawa amanah konstruktif amal telah diwujudkan oleh CKS pada tahun 1960 tidak boleh dipertikaikan. CKS jelas berkelakuan sedemikian rupa untuk mengetuai jawatankuasa kuil sementara dan masyarakat Cina tempatan pada masa tersebut untuk mempercayai bahawa kepentingan berfaedah ke atas sebahagian tanah akan terletak hak pada kuil untuk kebaikan bersama mereka. Keterangan menunjukkan bahawa apabila CKS memindahkan seluruh tanah kepada CSS, CKS juga tidak menimbulkan sebarang bantahan terhadap kehadiran kuil di atas tanah tersebut. Oleh itu, adalah tidak wajar sekarang untuk membenarkan pengganti dalam hakmilik mendiang

CKS, yang juga warisnya, untuk mengusir kuil atas alasan bahawa mereka adalah pemegang hak milik berdaftar (lihat perenggan 45).

(4) Dapatan hakim perbicaraan tentang kewujudan amanah konstruktif adalah berdasarkan keterangan SD1 yang merupakan satu-satunya saksi yang hadir dalam mesyuarat jawatankuasa interim yang membincangkan pembinaan kuil pada tahun 1960 dan yang mengatakan bahawa CKS bersetuju untuk mendermakan sebahagian daripada tanahnya untuk kuil. SD1 bagaimanapun tidak pernah menyatakan bahawa CKS bersetuju untuk menyumbangkan kawasan yang lebih luas di sekitar kuil yang akan digunakan sebagai dewan kuil atau untuk menjalankan aktiviti berkaitan kuil. Tiada keterangan dikemukakan tentang bila dewan tersebut dibina atau bila kawasan tanah di belakang dewan tersebut diperuntukkan untuk aktiviti kuil. Oleh itu, kawasan-kawasan yang meliputi kira-kira tiga perempat daripada tanah berkenaan bukanlah sesuatu yang CKS telah fikirkan pada tahun 1960 dan, oleh itu, tiada amanah konstruktif boleh timbul berkenaan dengan kawasan sekitar kuil tersebut. Amanah semestinya perlu dihadkan hanya pada bahagian tanah di mana kuil tersebut terletak bersama-sama dengan hak laluan untuk orang ramai mengaksesnya (lihat perenggan 52).

(5) Tuntutan balas responden tidak dihalang oleh had masa di bawah Akta Had Masa 1953 kerana masa untuk memulakan tindakan hanya bermula dari tarikh surat tuntutan perayu pada 2015. Perayu memfailkan tindakan mereka pada 2016. Kuil telah beroperasi pada tanah tersebut secara berterusan tanpa sebarang gangguan atau bantahan sejak 1961 walaupun selepas CSS memperoleh tanah daripada CKS. Ia adalah surat tuntutan perayu pada 2015 yang merupakan ancaman pertama yang jelas dan tidak berbelah bahagi kepada pemilikan tanah oleh kuil (lihat perenggan 56–57).

(6) Tindakan menceroboh perayu gagal sepenuhnya, bukan sahaja berkenaan dengan bahagian tanah yang terletak di atasnya tempat kuil tersebut (memandangkan dapatan bahawa amanah konstruktif telah wujud berkenaan dengannya) tetapi juga berkenaan dengan kawasan yang lebih luas di sekitar kuil yang digunakan sebagai dewan dan kawasan aktiviti am kerana tiada bantahan diambil terhadap penggunaan sedemikian sehingga perayu mengeluarkan notis tuntutan mereka (lihat perenggan 62).]

Cases referred to

Ahmad bin Hussin v Hajjah Mek bt Hj Hussain [1973] 1 MLJ 18, FC (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (refd)
Lian Keow Sdn Bhd (in Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)
Low Ting Yong @ Low Yong Lian v Low Yong Thua [2016] 3 MLJ 332, CA (refd)

Milroy v Lord [1861–73] All ER Rep 783; (1862) 45 ER 1185, CA (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)
Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd [2017] MLJU 1107; [2017] 8 CLJ 392, FC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1, FC (refd)
Stone World Sdn Bhd v Engareh (M) Sdn Bhd [2020] 12 MLJ 237, FC (refd)
Zainab bt Ibrahim v Limah bt Che Mat [2014] 6 MLJ 419, CA (refd)

Legislation referred to

Land Code (FMS Cap 138)
Limitation Act 1953 s 9(1)
National Land Code s 127
Rules of Court 2012 O 40
Rules of the Court of Appeal 1994 r 7(3A), (3A)(a)

Appeal from: *Chong Chee Piao & Ors v Koh Wah Leong* [2017] MLJU 2454 (High Court, Ipoh)

Raymond Mah Mun Kitt (with Denise Phang Hui Xian and Eric Toh Kah Yung) (MahWengKwai & Assoc) for the appellants.
Shanty Raj (with Ramesh Raj and Balbir Singh) (A Rajadurai P Kuppusamy & Co) for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court that dismissed the claim of the appellants who were plaintiffs in a trespass action. The respondent's counterclaim that the Chinese temple that is on the land in question is a beneficiary of a constructive trust was allowed. Pursuant to this finding, the High Court made a consequential order for the appointment of a surveyor to draw a plan of the land to determine the portion of the land occupied by the temple.

THE PARTIES

[2] The land which is the subject matter of the dispute in this case is described on the title as EMR 618, Lot 1421 Mukim Pengkalan Bharu. It is situated in Pantai Remis, Manjung District, Perak. It measures about two acres. The appellants/plaintiffs are the current registered owners of the land. The first to fourth appellants are the children of the previous registered owner, one Chong Swee Sing who died in 1995. The fifth appellant is the widow of the late Chong Swee Sing. The land was purchased by the late Chong Kew Sang

('CKS') who is the father Chong Swee Sing in 1944 from one Hj Rahimah bt Hj Ismail. The land was transferred to Chong Swee Sing by CKS on 6 May 1996. The late CKS is the central figure in the claim of the respondent that he donated the land for the purpose of constructing the temple in question.

[3] The respondent/defendant is the Chairman of Pertubuhan Penganut Penganut Ting Leong Keng Lee Hu Tong Chu. The society was registered in 1986. Prior to that, the temple was run by an informal committee. It manages and runs a Taoist temple that bears the name Ting Leong Keng Lee Hu Tong Chu Temple. The temple proper is situated on one end of the rectangular shaped land in question. It takes up about a quarter of the land. However, if a hall (which is actually an open shed) and an area used for fire walking ceremonies is taken into account, the total area occupied by the temple would be slightly more than 1.5 acres.

THE APPELLANTS' SUIT

[4] The appellants became registered owners of the land in 1995. They pleaded that they did not consent to the occupation of their land for temple activities. They issued several notices to quit since becoming registered owners. The last notice to the temple management was issued in 2015. Since no action was taken to vacate the land, the appellants filed the instant writ on 17 November 2016 which is founded in trespass. The plaintiff prayed for the following reliefs:

(a) vacant possession of the land;

(b) an injunction to prevent the respondent from trespassing their land;

(c) a mandatory injunction for the demolition of all structures including the temple in question within 30 days; and

(d) damages.

AMENDED DEFENCE AND COUNTERCLAIM

[5] The respondent has pleaded that the temple is not a trespasser as it was constructed on the land in 1961 and has been used for worship since then. The land was donated by CKS who was the registered owner at the material time. The purpose of the donation was to raise funds to construct the said temple. The respondent's pleaded case is that the trespass action is without basis for the following reason. An express trust had been created by the late CKS or a constructive had arisen over a portion of the land in question. That portion comprises three areas, ie the land on which the temple proper sits, the land on which the hall sits and the land at the back of the hall that is used for activities. The respondent prayed in the counterclaim for a declaration a trust had been created or had arisen in favour of the temple and for consequential reliefs.

A SUMMARY OF EVIDENCE

[6] A total of 11 witnesses gave evidence for the respondent. The crucial witnesses in respect of the claim of the respondent that the late CKS donated part of the land for the construction of the temple was SD1 and SD3. He said that in 1960, CKS attended a meeting in Pantai Remis to discuss the construction of the temple in question. He agreed to donate land for the temple to be built for the benefit of the surrounding Chinese community. SD1 was present at the said meeting. Subsequently, a building committee was formed. SD1 and other members were involved in collecting donations for the construction of the temple. Construction was completed in 1961. The temple committee commissioned two plaques to be affixed to the temple wall. One plaque contained the name of all those who donated above RM50 whereas the other plaque exclusively mentioned the name of the CKS with gratitude for having donated land for the temple. The plaques still remain on the temple wall and a photograph of it with the Chinese translation was admitted into evidence. When the temple management committee was finally registered with the Registrar of Society in 1986, SD1 became its treasurer.

[7] The other witnesses were SD2, SD3 and SD4. SD2 did not give direct evidence about CKS donating the land to the temple. SD2 could only say that the plaques in question had been put up a long time ago and still remain on the wall. SD3 was present at the temple opening ceremony. She was 14 years old that time. She identified the name of her uncle on the plaque that contained the list of donors who contributed money for the construction of the temple. However, she did not give evidence about the role of CKS in the construction of the temple. SD4 was 17 years old at the time of the opening ceremony of the temple. He said the late CKS was the guest of honour at the ceremony as he donated the land upon which the temple sits.

[8] SP1 was the only witness who testified for all the appellants. He said the title to the land was always with his family and that the respondent never asked for it for the purpose of transferring the land. To his knowledge, no one from the temple committee ever asked for permission to occupy the land. But he said that he did not know whether the late CKS donated the land in question to the temple as he was only three to seven years old at the material time. He knew about the existence of the temple only about ten to 15 years ago and he instructed his lawyer to issue a notice to the respondent. He said the temple was built without approval from the relevant authorities. The temple committee had also never paid any rental despite occupying the land and did not pay any portion of the parking fees collected from the temple devotees to the appellants.

DECISION OF THE HIGH COURT

[9] The learned judicial commissioner made a finding that in 1961, the late CKS donated part of the land for the construction of the temple in question. His Lordship held that a constructive trust had been created in favour of an informal committee as part of the land was donated for the construction of the temple and for the raising of funds for that purpose. The late CKS then became a trustee for the land occupied by the temple. His Lordship also found that the appellants knew of the existence of the temple from 1999 onwards at the earliest but did not take any action and therefore the doctrine of acquiescence and waiver operated as well. In the premises, His Lordship dismissed the claim of the appellants that was based on trespass and allowed the counterclaim which is based on constructive trust over the land occupied by the temple.

[10] However, in respect of the consequential relief sought by the respondent in respect of the portion of the land occupied by the temple, the learned judicial commissioner did not make final orders for the following reason. His Lordship's decision in the counterclaim was that a trust had been created over a portion of the land occupied by the temple. At the trial, the only plan that was before the court was the plan tendered by the surveyor of the respondent (Ridzuan bin Zulkifli SD6). In that plan, land measuring about 1.5 acres of the two-acre land is stated to be occupied by the temple. The surveyor told the court he was asked to include all the land occupied by the temple in the plan. The High Court noted that the plan did not indicate the area occupied by the temple proper, the other structures and the right of way in the following passage of the judgment:

> Ridzuan bin Zulkifli (SD6) is a licenced surveyor. Through him a plan of the land was tendered as exhs D11 and D12. The plans clearly showed the area on the land occupied by the Temple shaded in red. The plans thus demarcated the Temple area on the land. The purpose was to show the part of the land where the Temple was built on. I note that the plan was not a detailed plan — for instance no structures or buildings used in conjunction with the Temple activities were shown on the plans.

[11] The learned judicial commissioner ordered that 'a mutually agreed surveyor demarcate the area the temple occupies' and that he should show the 'structures and easements' on the land. His Lordship also stated that parties could come back to court for further consequential orders. As the parties were unable to agree on a licensed surveyor, the court subsequently appointed one. However, the parties did not go back to the High Court for further consequential orders because of the instant appeal.

APPLICATION TO ADDUCE SURVEY PLAN OF APPELLANTS (ENCL 54)

[12] Before we proceed to address the issues in the appeal proper, we shall give our reasons for admitting the survey plan of the appellants (exh CCS8) as fresh evidence for the purpose of this appeal. This plan was made only after the trial was over. The appellants filed a notice of motion (encl 54) to include the said survey plan (exh CCS8) and other documents (exh CCS1 to 5) on 15 September 2021. The essential facts that form the backdrop to this application are as follows.

[13] By the time the instant appeal came before us, the court appointed surveyor ('Juruukur Razif') had drawn a plan (exh CCS6) of the land as directed by the High Court. Although this plan showed the temple, the hall and the open space used for temple activities, it lacked details. The location of the individual structures and the size of the area occupied by the said structures were not indicated in exh CCS6. The entire land was partitioned into Plot A and B in which Plot B is the wider area that includes the temple proper, the temple hall and the said open space area used for activities. It takes up 1.565 acres of the two-acre land. Upon receiving the plan, the appellants commissioned Juruukur Perunding Services (Ipoh) Sdn Bhd to prepare a more detailed plan (exh CCS8) to indicate the exact area taken up by the temple proper, the hall and the open area. In this plan, the land on which the temple proper sits is shaded in orange. The hall and open space used by the temple is shaded in blue. The area upon which the temple proper sits is larger than in the plan (CCS6) drawn up by the court appointed surveyor as it includes the shrines that are located in front of the temple as well. It also includes the land through which the temple can be accessed from the road.

[14] On 8 February 2021, the appellants filed an affidavit to include in the record of appeal exh CCS6 and exh CCS8. The appellants also sought to include five other documents relating to further acts of trespass on the part of the respondent. The application to admit these documents were objected to by the respondent because leave of court was not obtained. On 23 August 2021, we ordered the admission of only exh CCS6 (the plan of the court appointed surveyor) into evidence. Nonetheless, we gave time to the appellants to file a motion to admit exh CCS8 and the other documents.

[15] On 15 September 2021, the appellants filed a notice of motion in encl 54 for leave to use the survey plan of Juruukur Perunding (CCS8) and the other documents exhibited earlier in the abovementioned affidavit or alternatively to include them as further evidence for the purpose of the appeal. On 20 October 2021, we unanimously allowed only exh CCS8 (the survey

plan of Juruukur Perunding) to be admitted as further evidence for the purpose of the appeal. Our reasons are as follows.

[16] Counsel for the respondent submitted that the three conditions in r 7(3A) of the Rules of the Court of Appeal 1994 which is a codification of the test laid down in *Ladd v Marshall* [1954] 3 All ER 745 for admission of further evidence were not met. Rule 7(3A) reads as follows:

> (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that —
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> (a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.

[17] In *Ladd v Marshall*, Denning LJ laid down the following three conditions for reception of fresh evidence in the following passage:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[18] In particular, counsel for the respondent argued that the reasonable diligence limb in r 7(3A)(a) and the *Ladd v Marshall* test was not satisfied. It was argued that the appellants failed to prove that exh CCS8 could not have been obtained with reasonable diligence before the trial. Counsel for the respondent also pointed out that the respondent had commissioned a survey plan before the trial but the appellants failed to do likewise.

[19] However, having considered all the circumstances of the case, we were persuaded by the argument of counsel for the appellants that the reasonable diligence condition was not breached for the following reasons. It is necessary to recapitulate some of the relevant facts that relate to the claim and counterclaim. In the instant case, the appellants (as the plaintiffs) claimed recovery of the entire parcel of the two-acre land on the ground that they had a valid cause of action in trespass against the temple. It was no part of the appellants' case that there was a constructive trust on either the land occupied by the temple or the land upon which the temple proper sits. The appellants were claiming for recovery of the entire land. In the premises, based on their

pleaded case, it was entirely unnecessary for the appellants to produce a survey plan that indicates the exact measurements of the structures on the land, ie the temple proper, the open shed that is used as a hall and the open space used for temple activities. On the other hand, it was the respondent who pleaded that the portion of land occupied by the temple constitutes trust land.

[20] The learned judicial commissioner made an order that the area 'occupied' by the temple is subject to a constructive trust. However, His Lordship did not any make any order to demarcate the trust land based on the survey plan tendered by the respondent as it lacked details. He ordered that 'a mutually agreed surveyor demarcate the area the temple occupies' and that the 'structures and easements' be shown on the plan. As the parties could not agree on a surveyor, the court appointed one to draw a plan. The objection of the respondent to the tendering of the plan (exh CCS6) of the court appointed surveyor was dismissed on 23 August 2021. However, this plan also did not contain the exact measurement of the structures on the land; particularly the area occupied by the temple proper. It only indicated that about 1.5 acres of land is occupied by the temple proper, the hall and the open space area that is used for activities. Counsel for the appellants submitted that the plan (exh CCS8) drawn by their surveyor is in response to the plan of the court appointed surveyor (CCS6) which does not contain the measurement of the structures on the land. We find merit in this argument as exh CCS6 did not exist at the time of the trial. Therefore, even with reasonable diligence, the appellants could not have produced a plan to complement it with exact measurements of the crucial structures on the land, especially the temple proper. Therefore, we are of the considered opinion that the reasonable diligence condition was not transgressed.

[21] We shall now consider the second condition which is that the fresh evidence would have had a determining influence or important influence on the High Court decision although it need have been decisive. In our opinion, exh CCS8 would have had an important influence on the decision of the learned judicial commissioner. His Lordship, after allowing the counterclaim and having found that part of the land was land under a constructive trust, did not make final orders in respect of the demarcation of the land because the survey plan tendered by the respondent did not depict the structures on the land. This is the very reason why His Lordship ordered that another survey plan be drawn and for parties to be at liberty to come back for further orders. Thus, it can be surmised that had a detailed survey plan been available earlier at the trial, it would have had a determining influence on the decision of the High Court. The respondent has vehemently objected to the application to introduce exh CCS8 into evidence. But ironically, without such a plan showing exact measurements of the structures on the land particularly the temple

proper, no final order to demarcate trust land can be made if the decision of the High Court is varied to limit the finding of constructive trust to only the land upon which the temple proper sits.

[22] The third condition for the reception of fresh evidence is that it must be credible. In the affidavit in support, it is stated that Juruukur Perunding who drew the survey plan is a licensed surveyor. The respondent did not challenge this assertion and did not challenge the accuracy of the measurement of the structures in question either through a rebuttal survey plan. In fact, the main difference between exh CCS8 and the other two survey plans is that it contains measurement of structures on the land. Thus, in our opinion, the credibility condition was satisfied as well.

[23] Now we turn to the rest of the fresh evidence (exh CCS1–5) sought to be admitted in encl 54. We did not admit the said fresh evidence in the form of a police report, photographs and correspondences between the parties relating to trespass on a different portion of the same land. The alleged trespass occurred after the judgment of the High Court. In our opinion it is possible that they could constitute the subject matter of a new cause of action. But they cannot have a determining influence on the decision already made by the High Court in respect of land upon which the temple sits or occupies.

[24] For the above reasons, we admitted only exh CCS8 into evidence by granting order in terms of prayer 1.6 of encl 54.

ISSUES IN THE APPEAL

[25] Having regard to the claim and counterclaim, the main issue would be whether the High Court was right in finding that a constructive trust had been created over the land occupied by the temple. Assuming that the answer is in the affirmative, the next crucial issue would be whether the High Court was right in deciding that all the land occupied by the temple as opposed to the land on which the temple proper sits is subject to the constructive trust. Thus, we shall first consider the issue relating to the finding of constructive trust and the portion of land covered by it.

Constructive trust

[26] In the counterclaim, the respondent pleaded express trust, implied trust and constructive trust in respect of the land occupied by the temple. We have adverted to the finding of constructive trust by the learned judicial commissioner in favour of the informal temple committee in 1960 and the successor committees.

[27] Counsel for the appellants challenged the finding that a trust had been created for the following reasons. Firstly, he argued that appellants are the registered owners and that no portion of the land had been conveyed by legal title to the successive temple committees since 1960. We find no merit in this argument for the following reason. Assuming that the learned judicial commissioner was correct in finding that the successive temple committees and its members were beneficiaries of a constructive trust since 1960, their rights would have not been defeated by the mere fact that there was no conveyance of legal title to them and that the descendants of CKS remained the title holders. In *Lian Keow Sdn Bhd (in Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, Syed Agil Barakbah SCJ at the Supreme Court said that the National Land Code does not prevent or restrict the creation of beneficial interests in land by way of express, implied or resulting trust and that it does not abrogate the principles of equity.

[28] Secondly, counsel for the appellants submitted that the three certainties for the creation of a trust were not proven. Therefore, it could not be said that CKS held a portion of his land in trust for the temple. Thirdly, counsel for the appellants argued that the gift is an imperfect gift and only amounted to a gratuitous promise.

[29] Counsel for the appellants cited the general principle on voluntary settlements and trusts that was pronounced by Turner LJ in the well-known case of *Milroy v Lord* [1861–73] All ER Rep 783; (1862) 45 ER 1185 which is as follows:

> I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift.

[30] Based on the above passage, counsel for the appellants argued that the three certainties of trust were lacking, ie certainty of words in respect of the intention of the testator, certainty of the subject matter of the trust and certainty of the object of the trust. In the premises, it was submitted that no trust was created in favour of the present temple committee. Counsel for the appellants also submitted that the gift of land, in any, was an imperfect gift. But it must be noted that the High Court made a finding in favour of the temple

based on constructive trust and the appellants did not raise the issue of imperfect gift in their pleadings. In the premises, the appellants should not be permitted to raise it now.

[31] In respect of the argument that the intention of CKS was not proved, counsel for the appellants pointed out that the respondent also relied on implied and constructive trust as the temple was constructed in 1961 and had been used for worship continuously up to present time.

[32] We find merit in the submission of counsel for the respondent that in the case of implied and constructive trust as opposed to an express trust, the element of intention to create a trust on the part of the testator is not essential. It is a trust that is imposed by the law to prevent unfairness or injustice. In the recent case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1, Zabariah Mohd Yusof FCJ at the Federal Court said as follows about the irrelevance of intention in a finding of constructive trust:

> [111] *It is trite law that the intention to create a trust is applicable in situation of express trusts and not in constructive trusts.* Constructive trust are trusts that may be implied in the absence of any declaration/intention of a trust, where the trustee has induced another to act to their detriment they would acquire a beneficial interest in the land/property. A characteristic feature of this trust does not owe its existence to the parties' intention, but by operation of law. In *Takako Sakao v Ng Pek Yuen* [2009] 6 MLJ 751; [2010] 1 CLJ 381, it was held that:
>
> > A constructive trust is imposed by law irrespective of the intention of the parties. And it is imposed only in certain circumstances, eg where there is dishonest, unconscionable or fraudulent conduct in the acquisition of property. What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or part thereof.
>
> [112] Constructive trust is viewed as a device under which equity will intervene so as to create a trust relationship between the parties in order to make a person accountable for the trust to prevent any unfairness or injustice. Equity will impose obligation on the defendant to hold the property for the benefit of another. (Emphasis added.)

[33] In the earlier case of *Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* [2017] MLJU 1107; [2017] 8 CLJ 392, the Federal Court also emphasised the principle that constructive trust is a trust imposed by equity in order to satisfy the demands of justice and good conscience without reference to intention of the parties. Zulkefli Ahmad Makinudin PCA who delivered the decision of the court said as follows:

> [59] It has also been held that a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties (see the case of *Hassan*

Kadir & Ors v Mohamed Moidu Mohamed & Anor [2011] MLJU 1556; [2011] 5 CLJ 136 (FC)). A constructive trust is a remedial device that is employed to prevent unjust enrichment. It has the effect of taking the title to the property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it (see the case of *Tay Choo Foo v Tengku Mohd Saad Tengku Mansur & Ors. And Another Appeal* [2009] 1 MLJ 289; [2009] 2 CLJ 363 CA).

[34] Thus, a written document evidencing the existence of a trust is also unnecessary. The Court of Appeal in the case of *Zainab bt Ibrahim v Limah bt Che Mat* [2014] 6 MLJ 419 said as follows:

> [11] We bear in mind that a trust does not arise by written documents alone. It may arise orally or inferred from the conduct of the parties, this is particularly so of a constructive trust. We bear in mind also that a party is entitled to rely upon a trust being honoured. It is not disputed, in this case, that the plaintiff had remained on the land at all times.

[35] In the instant case, after having considered the evidence and applying the principles of a constructive trust, the learned judicial commissioner granted proprietary rights to the respondent over the land occupied by the temple as per the counterclaim. His Lordship concluded as follows in para 60 of his judgment:

> What can be extracted from these authorities cited above is that the concept of constructive trust is tied up with the principles of fairness and good conscience. It is my view that the Temple had been occupying the land since 1960. Much labour and money had gone in the construction of the Temple premised on the donation by CKS. Further, as mentioned earlier, there was uninterrupted occupation of the land by the defendant for most of the time. With reasoning I find that the in all fairness and good conscience a constructive trust is imposed over the land the Temple was built on and constructive trusteeship is placed on the plaintiffs who are responsible for that disputed property. See *Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors* [2009] 2 MLJ 765; [2009] 3 CLJ 10; [2009] 1 LNS 23.

[36] As we said earlier, in the instant case, the case of the respondent was anchored on constructive trust. At the material time in 1960, CKS's name was not on the land register as the land owner. CKS had purchased the land from one Hj Rahimah bt Hj Ismail in 1944. He then lodged a caveat on the land pending registration of his name on the title. The land was vested in the name of CKS via a court order on 6 June 1966 and on the same day, CKS transferred the land to his son, Chong Swee Sing. The present respondents inherited the land after Chong Swee Sing passed away in 1994. Although, the late CKS transferred the undivided land in 1966 to his son, we would agree with the learned judicial commissioner that his promise to the interim temple committee in 1960 to donate part of the land and his subsequent conduct in

affirming his decision made him a trustee of the portion of the land upon which the temple proper was constructed. A

[37] The learned judicial commissioner gave careful consideration to the virtually unchallenged evidence of the following witnesses as the appellants had no knowledge about his grandfather's (CKS) role in the construction of the temple in 1960. We summarised the evidence of SD1 and SD3 earlier. We shall refer to the salient points of their evidence which the learned judicial commissioner considered in holding that a constructive trust had arisen in favour of the temple. B C

[38] SD1 was appointed as the treasurer of the Pertubuhan when it was formally registered in 1986. But his association with the temple goes back to the time it was constructed. SD1 was 20 years old at that time. He said that in 1960, the Chinese community in Pantai Remis wanted to build a temple for the deity referred to as Ting Leong Keng Lee Hu Tong Chu. An informal temple committee was formed. It included the late CKS who was a prominent member of the local community. He agreed to donate land for the temple so that funds could be raised to construct it. The other members of the committee and the local community donated money for the construction. The evidence of SD1 about the role of the late CKS in the construction of the temple was as follows: D E

> The group of members that were part of the surrounding community that were there at this meeting agreed and decided to build a Chinese Temple in honour of Ting Leong Keng Lee Hu Tong Chu. That the late Chong Kew Sang, who owned a piece of land around the area had decided and agreed to donate and give that piece of Land for the construction of the temple to be built on it. We agreed that the since the late Chong Kew Sang is donating a piece of land for the construction of the Chinese temple, that the rest of the ground of members of the community would donate monetarily for the costs of the construction of the temple. F G

[39] SD1 also said none of the members of the committee would have donated money for the construction of the temple if the late CKS had not agreed to give the land for the construction of the temple. The temple that was constructed was a permanent structure. The temple committee commissioned two plaques to be affixed to the temple wall; one with the names of those contributed above RM50 and the other plaque carried the sole name of CKS to acknowledge his contribution of the land. The writing on the plaque recording the contribution of the late CKS was translated into Malay by a certified court interpreter. It reads as follows: H I

> Tanah dan Bangunan Diguna pakai oleh Pertubuhan Penganut Penganut Ting Leong Keng Lee Hu Tong Chu adalah diderma oleh Penganut Tempatan yang bernama Cheong Kew Seng. Batu Lisan in diperbuat sebagai kenangan atau bukti jasa budi baik penderma dengan secara rasmi pada tahun 1961.

[40] At the temple opening ceremony, the late CKS was the guest of honour as he had donated the land. In subsequent temple functions, the first two rows of the chairs of the audience would be reserved for the late CKS and his family.

[41] SD1's evidence was not credibly challenged during cross-examination with regard to his claim about the role of the late CKS in the construction of the temple. Neither was it rebutted by the evidence tendered on behalf of the appellants. SP1 who was the sole witness for the appellants was only seven years old at the time the temple was constructed. He agreed during cross-examination that he would not have known if his grandfather (the late CKS) had donated the land in question for the temple to be built. He only said that as his family members are Buddhist they would not have donated land for the construction of a Taoist temple. However, when it was put to him that Chong Miew Chin (his uncle and a son of the late CKS) is a devotee of the temple, he said that he was not aware about that fact.

[42] The other witnesses (SD2, SD3 and SD4), who were present during the temple opening ceremony in 1961 and whose evidence we referred to earlier did not corroborate SD1 about the donation of the land by the late CKS. However, they corroborated SD1 that the late CKS and his family were devotees of the presiding deity of the temple and they were always given a place of honour at its functions.

[43] The learned judicial commissioner accepted the crucial evidence of SD1 and the above witnesses. To recapitulate, the essential point of SD1 evidence is that the late CKS agreed to donate part of his land for the construction of a temple. He was on the interim committee that raised funds for the construction of the temple that is a permanent concrete structure. If not for CKS's declaration to the committee and the local community about his intention to donate land for the temple, it would not have been possible to raise funds. He did not donate money unlike other prominent members of the community. After the temple was constructed, he was honoured by having his generous contribution permanently recorded on a plaque that was affixed to the temple wall. There is evidence that CKS and his immediate family were devotees of the temple. For a continuous period of about 55 years during his lifetime and that of his son, the temple operated on the land without any interference. Thus, the late CKS, despite the absence of a written deed to transfer the land to the interim temple committee or a formal trust deed, had clearly intended to create a trust to benefit the local Chinese community who were devotees of the presiding deity of the temple. The transfer of the land by the late CKS to his son in 1966 did not mean that there was no intention to allow the temple to remain on the land. It was an undivided two acre parcel of land and the temple in 1966 took up only a small portion of the land. Even, if it can be argued that the late CKS did not express intention to create a trust, his

promise to donate land and his encouragement at the time of the erection of the elaborate concrete temple and his subsequent acquiescence in allowing the temple to remain on the land and accepting a place of honour in its ceremonies has given rise to a constructive trust as found by the learned judicial commissioner.

[44] Counsel for the appellants submitted that there was no certainty of subject matter of the trust as there is no indication via a survey in 1960 to indicate the exact boundary of the temple land. We find no merit in this issue as the temple is a permanent physical structure. In the premises the subject matter is generally ascertainable even if the exact boundary of the temple land was not demarcated at the time of the creation of the trust in 1960. Counsel for the appellants also argued that the exact boundary was not determined by the learned judicial commissioner at the time of the decision but was left to be determined via a consequential order. As correctly submitted by counsel for respondent based on the authority of the Federal Court case of *Stone World Sdn Bhd v Engareh (M) Sdn Bhd* [2020] 12 MLJ 237, superior courts have an inherent power to give effect to their judgment through consequential orders and that such orders do not transgress the principle of *functus officio*. Therefore, the fact that the learned judicial commissioner found it necessary to make a consequential order to give effect to his judgment does not necessarily mean that there was no certainty of the subject matter of the trust or that such an order was made in want of jurisdiction. For this reason, the argument of counsel for the appellant that the learned judicial commissioner appointed a 'court expert' without complying with O 40 of the Rules of Court 2012 has no merit. The appointment was made to give effect to the judgment of the court as the plan tendered by the respondent lacked details. For the same reason also, the argument that the judge had delegated the judicial function to a surveyor is without merit.

[45] Based on the above facts, we are of the view that the finding of the learned judicial commissioner that a charitable constructive trust had been created by the late CKS in 1960 cannot be assailed. The late CKS had clearly conducted himself in such a manner so as to lead the interim committee and the local Chinese community at that time to believe that beneficial interest over a portion of the land would vest in the temple for their common good. There was evidence from the respondents' witnesses that when CKS transferred the entire land to Chong Swee Ling, the latter did not raise any objection to the presence of temple on the land either. In the premises, it would completely unconscionable now to permit the successors in title of the late CKS who are also his heirs to evict the temple on the ground that they are the registered title holders.

Portion of trust land

[46] As for the exact portion of the land that should constitute the trust land, there is a serious dispute between the parties. Counsel for the appellants argued that, even assuming that there is a constructive trust in favour of the temple, it cannot include the present day area 'occupied' by the temple as found by the learned judicial commissioner'. We shall consider this crucial issue now.

[47] As we said earlier, at the trial only one plan was tendered by the surveyor of the respondent (SD6). The temple proper sits on an area that is about less than a quarter of the two acre land. However, in the plan drawn up by SD6 (Ridzuan), about 1.5 acres of the land is marked in red as the temple land. SD6 told the court that he was instructed not only to include the land upon which the temple proper sits but also all the land used by it. During cross-examination he said as follows:

> PC1: En Rizuan, apakah tujuan plan ini dibuat atau dilukis oleh En Ridzuan, tujuan, sebab?
>
> SD6: Tujuan pelan ini dilukis adalah kami dilantik oleh client pada masa itu untuk menandakan kawasan yang digunapakai oleh kawasan kuil jadi dalam takrifan ukur kita panggil sebagai demarcation sebab itu kita panggil sebagai pelan ukuran demarkasi.
>
> *PC1: Pelan ini dilukis berdasarkan atas tanah keseluruhan sahaja atau dimana kuil itu dibina?*
>
> *SD6: Kawasan yang digunapakai oleh kuil.* (Emphasis added.)

[48] To a question by the court on this point, SD6 said that he included the area around the building as well in his plan to demarcate the temple land. The evidence is as follows:

> Mah: Ini pelan ini, kawasan yang digunapakai oleh kuil?
>
> SD6: Ya Yang Arif.
>
> Mah: Maknanya bukan sahaja bangunan lah, sekeliling pun juga.
>
> SD6: Ya

[49] Thus, the area marked in red by SD6 included not only the land upon which the temple proper sits but also an area adjacent to it that includes an open shed that is designated as the 'temple hall' and the land behind it that is used for temple activities such as fire walking ceremony. But the plan of SD6 did not indicate the various structures such as the temple proper, the hall, the area used for activities and the access road. When making his finding that a constructive trust had arisen in favour of the temple, the learned judicial commissioner found that the plan of Ridzuan lacked details and ordered that 'a mutually agreed surveyor demarcates the area the temple occupies'.

[50] As we said earlier, counsel for the appellants submitted that even if a constructive trust exists, the subject matter of it cannot include the wider portion of land used by the temple devotees at present time to encompass the open shed used as a hall and the land behind it. In other words, it must be limited to the building footprint of the temple proper that was constructed in 1961. In the premises, counsel for the appellants argued that the learned judicial commissioner was wrong to grant an ancillary order that refers to 'the area the temple occupies'.

[51] We note that the learned judicial commissioner did not define 'the area the temple occupies'. Assuming that it includes the entire area occupied by the temple, hall and open space as argued by counsel for the respondent, as an appeal is a rehearing, we can decide afresh whether the constructive trust had arisen on the wider area or the smaller area. We find considerable merit in the argument of counsel for the appellants that constructive trust exists only on the area upon which the temple sits with allowance for right of way. Our reasons are as follows.

[52] The finding of the learned judicial commissioner that a constructive trust exists is based on the evidence of SD1. He was the only witness who was present at the meeting of the interim committee that discussed the construction of the temple in 1960. He said the late CKS agreed to donate land for the temple. The temple was constructed by 1961. However, SD1 never said that the late CKS agreed to donate the wider area on which the open shed that is used as a temple hall was constructed. It is more than double the size of the land on which the temple proper sits. Likewise, SD1 did not say that the late CKS agreed to donate another equally large open space area for temple activities. The other witnesses (SD2, SD3 and SD4) had no direct knowledge of the donation of land by the late CKS. But it must be noted that none of the witnesses including SD1 gave any evidence about the date of the construction of the hall. There was simply no evidence tendered about the date of construction of the hall. Similarly, there was no evidence when the area of land behind the hall was appropriated for temple activities. In the premises, the expanded land area which covers about three quarters of the land in question cannot be something that was contemplated by the late CKS in 1960. The plaques which are crucial evidence for the respondent were placed in the temple in 1961. The 'donation' mentioned in the plaques must necessarily refer to the land on which the temple proper sits as there is no evidence that the temple hall had been constructed at that time. It follows that no constructive trust can arise on the wider area. It must be necessarily be restricted to the portion of land upon which the temple proper sits together with right of way for the public to access it. We note that the learned judicial commissioner did not refer to any evidence to support the finding that a constructive trust had also arisen over the wider area which includes the hall and open space used for activities. Therefore,

we are of the respectful view that the learned judicial commissioner erred in granting all the land occupied by the temple presently which includes the hall and the area used for activities. In the premises, His Lordship's decision is varied to only that portion of land upon which the temple proper sits with allowance for right of way. We note that in the plan exh CCS8, the area upon which the temple proper sits inclusive of right of way is clearly marked in orange and with exact measurements. Accordingly, the respondent is entitled to claim only that land as trust land.

OTHER ISSUES

[53] In the course of arguments, counsel for the appellants raised other issues including issues that were not raised in the court below. We shall address them below.

Limitation

[54] Counsel for the appellants argued that the counterclaim based on trust is barred by the Limitation Act 1953. He said that the learned judicial commissioner erred in finding the limitation period only ran from the last letter of demand that was sent on 14 October 2015. He cited s 9(1) of the Act that reads as follows:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims to that person.

[55] Counsel for the appellant also argued that it is trite law that in an action to recover possession of land, the right of action accrues when there was an infringement of such right or at least when there is a clear unequivocal threat to infringe that right by a party against whom the action is instituted.

[56] Based on the above argument, counsel for the appellant submitted that the limitation period for the respondent to claim interest over the portion of the land where the temple proper is located started to run from 6 May 1996 which is the date the land was transferred from the late CKS to his son, Chong Swee Ling. However, we are persuaded by the argument of counsel for the respondent that time to commence action only ran from the date of the letter of demand in 2015. We have earlier referred to the finding of the learned judicial commissioner that the temple was allowed to operate on the land without any interference continuously since 1961. There is no evidence that Chong Swee Ling objected to the presence of the temple when he became the registered owner. In the premises, as submitted by counsel for the respondent, the letter of demand issued in 2015 constituted the first clear and unequivocal

threat to the respondent's right to possession. The facts of the instant case in respect of the commencement of the limitation period are somewhat similar to the facts in the old case of *Ahmad bin Hussin v Hajjah Mek bt Hj Hussain* [1973] 1 MLJ 18. In that case, the plaintiff claimed possession of certain lands from the defendant as he was the registered proprietor and as he was the son of one Merah to whom the land belonged originally. The defendant counterclaimed for the lands be registered in her name because she bought them from Merah. The plaintiff's plea that the claim was barred by limitation was dismissed and judgment was given to the defendant. The decision was upheld by the former Federal Court. Suffian FJ clearly said that the right of action accrued not from the date of the sale but from the time the defendant asserted her right and it was infringed by Merah or the plaintiff. We reproduce the relevant passage of the judgment of the Federal Court below:

> I have studied the cases cited by Mr Wilson on limitation, and in particular a Privy Council decision, *Bolo v Koklan* 57 IA 352; one decision of this court's predecessor (namely, the Court of Appeal) in *Ponnusamy & Another v Nathu Ram* [1959] MLJ 86 and two decisions of this court, *Ng Moh v Tan Bok Kim & Another* [1969] 1 MLJ 46 and *Nasri v Mesah* [1971] 1 MLJ 32 and I am satisfied that the defendant's right of action accrued not from the date of the sales but *from the time when the defendant asserted her right and it was infringed by Merah or the plaintiff or from the time when there was a clear and unequivocal threat by Merah or the plaintiff to infringe that right.*
>
> The next question concerning limitation that arises is one of fact — when did the first clear and unequivocal threat by Merah or the plaintiff of the defendant's right occur? If it occurred more than twelve years before the date of the counterclaim, then the counterclaim is statute-barred. As to this, it should be borne in mind that the onus is not on the defendant but on the plaintiff to prove that the threat took place more than twelve years before the date of the counterclaim. (Emphasis added.)

[57] In the instant case, from the evidence and the finding of facts by the learned judicial commissioner that we mentioned earlier, there was no threat to the continued use of the land by the temple in 1966 when the late CKS transferred the undivided title of the land to his son. It was only in 2015 that a clear and unequivocal threat to the possession of the land by the temple arose when a letter of demand was issued by the appellants. As the limitation period is 12 years under s 9(1) of the Limitation Act 1953, the counterclaim of the respondent is not time barred as the action was filed in January of 2016.

Standard of proof

[58] Counsel for the appellant submitted that the standard of proof that must be applied when determining whether a trust exists is the 'beyond reasonable doubt' standard as opposed to the 'balance of probabilities' standard applied by the High Court. In support, he cited the Court of Appeal case of *Low Ting Yong @ Low Yong Lian v Low Yong Thua* [2016] 3 MLJ 332. However, as submitted by counsel for respondent, in the landmark case of *Sinnaiyah &*

Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1, the Federal Court clearly said that in civil cases the standard of proof is on the 'balance of probabilities'. The relevant passage is as follows:

> [49] With respect, we are inclined to agree with learned counsel for the plaintiff that the correct principle to apply is as explained in *In re B (Children)*. It is this: that *at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases.* As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard. And '(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. (Emphasis added.)

[59] In the premises, the argument that the learned judicial commissioner misdirected himself on the applicable standard of proof is without merit.

Illegality

[60] Counsel for the appellant argued that the construction of the temple on the land breached the implied conditions of the Federal Malay States Land Code (Cap 138) and the category of land use in the National Land Code (NLC). It was submitted that in 1960, the permitted category of land use was 'agriculture' with the express condition of 'commercial plantation-rubber'. It is further argued that for this reason, the land is liable to be forfeited by the state authority under s 127 of the NLC. This issue was neither pleaded nor raised in the court below. In the same vein, counsel for the appellants also argued that the local authority, ie Majlis Perbandaran Manjung could not find any record of the existence of a development plan for the construction of the temple. In summary, counsel for the appellants argued that the respondent had not come to court with clean hands in respect of the counterclaim as the temple was constructed illegally.

[61] At the High Court, the appellants never raised the issue of illegality in respect of the construction of the temple in 1961. The copy of the title in the bundle of documents does not show express conditions or restrictions. The extract from the register referred to in the submission of counsel for the appellants refers to a search made in 2016. There is no evidence when the express condition of 'commercial plantation — rubber' was imposed. Thus, in our opinion, there is simply insufficient evidence to consider the illegality point at this stage.

Trespass

[62] The High Court dismissed the trespass action of the plaintiffs upon finding that a constructive trust had come into existence because of the conduct of the late CKS in permitting the construction of the temple on his

land. In the premises, the trespass claim on the area upon which the temple proper sits must fail. In respect of the wider area that includes the hall and the open space behind it, we shall also affirm the decision of the High Court to dismiss the trespass action as no objection to the use of it was taken until notice of demand was issued.

CONCLUSION

[63] For all the above reasons, we allowed the appeal of the appellants in part. The order of the High Court was varied by substitution of the following order:

(a) we grant a declaration that a constructive trust had arisen in favour of the respondent only in respect of the land shaded in orange in the plan marked as exh CCS8 inclusive of right of way;

(b) that vacant possession of the balance of the land, ie the hall and open space used for temple activity marked in blue which is occupied by the respondent be given to the appellants within three months; and

(c) no order as to costs.

Order accordingly.

Reported by Ashok Kumar